IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEVIN JOHNSON AND TYLER LANG, Defendants.	Docket No. 14 CR 390 Chicago, Illinois February 19, 2015 10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT
BEFORE THE HONORABLE AMY J. ST. EVE

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THE CLERK: 14 CR 390, United States vs. Kevin Johnson and Tyler Lang.

THE COURT: Good morning.

MS. BIESENTHAL: Good morning, your Honor, Bethany Biesenthal and Bill Ridgway for the United States.

MR. MEYER: Good morning, Judge, Geoffrey Meyer from the Federal Defender Program on behalf of Mr. Lang.

MR. DEUTSCH: Good morning, Judge, Michael Deutsch and Lillian McCartin on behalf of Kevin Johnson, who is present in open court.

I also want to introduce Rachel Meeropol, who is the senior staff attorney for Center For Constitutional Rights. And she'll be arguing on behalf of both defendants on the motion.

THE COURT: Good morning.

MS. MEEROPOL: Good morning, your Honor.

MR. MEYER: Judge, just so you're aware, Mr. Lang's presence was waived today. We originally had -- we were going to ask the Court to allow him to phone in, but that's not going to work with his work schedule.

THE COURT: Okay.

So, he is choosing not to come for purposes of today?

MR. MEYER: He is choosing not to come.

THE COURT: Okay.

So, you are here for oral argument on the motion to

dismiss.

Ms. Merropol, you are going to argue on behalf of both defendants; is that correct?

MS. MEEROPOL: That's right, your Honor.

THE COURT: Okay.

Are there any preliminaries, any issues you want to address up front before we start?

MS. BIESENTHAL: No.

THE COURT: Ms. Biesenthal, are you arguing for the government?

MS. BIESENTHAL: I am.

THE COURT: Okay.

MR. DEUTSCH: Can we be seated?

THE COURT: Everyone else may be seated, yes.

Whenever you are ready.

Ms. Biesenthal, you can sit if you want until it is your turn, or you can stand. Whatever your preference.

MS. BIESENTHAL: I'll sit, Judge. Thank you.

MS. MEEROPOL: Thank you, your Honor.

Before I begin, I'd like to request the opportunity for rebuttal.

THE COURT: Certainly.

MS. MEEROPOL: Thank you.

THE COURT: Certainly.

I know you were not here at the status last week, but

I did not set time limits. We will take whatever we need.

It would be helpful to address the issues in the order that you presented them in your brief, if you would, please.

MS. MEEROPOL: Absolutely, your Honor.

This is a facial challenge of first impression to Section (a)(2)(A) of the Animal Enterprise Terrorism Act, and we have three constitutional claims. First, that the law is overbroad because it covers a substantial amount of protected speech and advocacy --

THE COURT: That one is not really a first impression, is it, though, because didn't Blum -- and I know you were on that case -- didn't Blum address that, although in a different procedural context?

MS. MEEROPOL: Well, Blum was a standing decision, your Honor, and the Court did engage in some statutory interpretation; but, the question before the Court was whether the plaintiffs in that case had a credible fear of enforcement under the statute, which requires a certain amount of statutory interpretation.

But the Blum court didn't actually interpret the meaning of (a)(2)(A)'s provision. Instead, the court relied entirely on the savings clause.

For an overbreadth challenge, the proper first step of the analysis is to interpret what the statute itself

covers. And that requires the Court to initially look at the operative provision itself, (a)(2)(A) of the Animal Enterprise Terrorism Act, which prohibits damaging or causing the loss of any real or personal property, including animals or records, used by an animal enterprise.

Now, there's really no dispute in this case that the plain language of any personal property includes intangible property. We cited the dictionary definition, various torts and contracts cases that interpret property as including intangible property, and also provided examples of the instances in which Congress specifies tangible personal property.

THE COURT: And you are only challenging that particular section, correct?

MS. MEEROPOL: That's right.

THE COURT: I know there was, in the response, a standing challenge as to anything else. But it seemed to me it was clear you were only challenging that particular section that your client has been charged with.

MS. MEEROPOL: That's right. (A)(2)(A) only. Not (a)(2)(B), which was, of course, the provision at issue in the Buddenberg case.

So, given that there's no dispute that the plain language meaning -- the plain dictionary meaning -- of "any personal property" includes intangible property, the

government relies on three arguments to make their point that the Court should read "any personal property" as actually meaning only tangible property.

The first argument relies on the parenthetical "including animals or records." The problem with this argument is that the government has failed to cite a single case or any kind of a statutory interpretation in which a parenthetical that includes the word -- that begins with the word "including" can be used to restrict a broad statutory term. Parentheticals that begin with "including" can expand. They can emphasize. They cannot restrict the plain meaning of statutory language.

THE COURT: But they can also explain, can't they?

MS. MEEROPOL: They can. They can explain, your Honor. And --

THE COURT: So, they do not necessarily expand it.

MS. MEEROPOL: Right. They can explain. They can emphasize.

And in this point, it's most likely -- I read the statute -- that Congress wanted to emphasize here two types of property that they were particularly concerned about, given the nature of the Act: Animals and records. Perhaps it was also important to include animals because that might not be commonly understood as property.

But, your Honor, a parenthetical cannot be used to

restrict. There is simply no precedent for use of a parenthetical in that way, especially when the statutory provision includes the word "any," which is as broad a statutory term as Congress can use. And when Congress uses the term "any," the courts have interpreted it to have its plain meaning -- anything that falls into that category.

The government also relies on the fact that the provision states that the property is used by an animal enterprise. But animal enterprises use money and their business reputation in the same way that they use tangible property. That word can't transform an incredibly expansive statutory term -- "any personal property" -- into a limited restriction on causing damage to tangible personal property.

The government's second argument is that the interaction of the penalty provision and the substantive provision transform the broad statutory language. And here, they're referring to the way in which the penalty provision bases penalty on the amount of economic damages that occur.

But, you know, I think this is really based on --

THE COURT: It is something a little bit different than that, isn't it? Isn't it that under statutory rules of construction not that they base the penalties on economic damage, but that they use the words specifically "economic damage" when they mean economic damage and they use it in the same statute, which is a little bit different than what you

are saying?

MS. MEEROPOL: Yes, your Honor. So, they do use the word "economic damages." But it's as a noun. It's as a measure of the damage that occurs when there's a substantive violation. The way the phrase "damage" is used in the substantive provision is completely different.

And it's a very confusing proposition because of the way that "damage" functions as both a noun and a verb. And many of these cases sort of, you know, conflate the two -- many of the contracts torts cases. It's hard to parse them to understand whether the court is analyzing economic damage that has occurred as a result of a substantive violation or whether the damage is itself the substantive violation.

But given that (a)(2)(A) includes not just the term "damage," but "caused the loss of property" -- right? -- it's two different ways in which a substantive violation can occur. And "caused the loss of property" is logically read to connect to causing the loss of intangible property, causing the loss of money.

So, given that there's no parallel wording that the Court could actually compare here -- and one could imagine the statute being written differently, right? One could imagine that the statute prohibits causing economic damage to an animal enterprise or causing damage to an animal enterprise.

If that were the case, then I think the government

would have a stronger argument. But because the provision is written so broadly and the operative term to interpret here is really the "any personal property" term, not the "damage" term, their argument cannot defeat the plain meaning of the broad provision.

Finally, your Honor, in terms of the overbreadth analysis, the government points to the rules of construction, which state that the AETA should not be interpreted to prohibit First Amendment protected activities, especially expressive conduct like peaceful protesting and demonstration.

The most important point about this is to recognize that the Court must interpret the statutory provision first. Right? This overbreadth analysis requires the Court to decide whether that provision -- whether (a)(2)(A) -- does allow for the punishment of First Amendment protected activity that causes a business to lose profit.

THE COURT: But can the Court really interpret that without looking at the rules of construction?

MS. MEEROPOL: Well --

THE COURT: And what are you relying on to say that the Court has to look at the statutory language itself separate and apart from the rules of construction? Because that certainly does not seem like the congressional intent here when you look at the underlying legislative history.

MS. MEEROPOL: Well, what precedent tells us -- and

it's just these cases perhaps the most commonly cited on this issue; Humanitarian Law Project also sort of provides an example of how it works in practice -- is that certainly a rule of construction can serve to illuminate congressional intent not to violate the First Amendment.

So, if there are two competing valid interpretations of a statute, the savings clause, congressional intent can sort of push the Court to one way or the other. But there has to be two competing valid interpretations. Otherwise, what you have is a situation where one provision of the statute by its terms prohibits protected conduct and another provision says it doesn't. And that's a contradiction in the terms of the statute, which is not adequately protective of First Amendment rights because individuals can't have to guess which provision will be enforced.

If the Court doesn't first interpret what (a)(2)(A) prohibits, then we're in a situation where that provision could be completely invalid on its face, as we argue, and the savings clause has actually saved an otherwise invalid statute when it's quite clear all the precedent -- and the government acknowledges this -- is that a savings clause cannot save a statute that is otherwise invalid on its face.

THE COURT: So, would you agree, then, that if the statute itself is open to more than one interpretation, one of them not violating the Constitution, that the savings clause

here would save it?

MS. MEEROPOL: If it's legitimately open to more than one interpretation, yes, your Honor. That is the time in which a savings clause would operate.

But this statute simply is not legitimately open to more than one interpretation. The two -- the only two -- arguments that the government has to defeat the plain meaning of "any personal property," which they have not disputed, is the parenthetical -- which has never been used; they don't cite a single case where a parenthetical restricts -- and the interaction with economic damages, which would rely on a completely different sort of phrase, a different part of speech even, to try to limit an otherwise very broad provision.

THE COURT: What role should the very clear directive from the legislative history play in interpreting the statute here?

MS. MEEROPOL: Well, your Honor --

THE COURT: Because I think even you would agree that the legislative history has a very clear directive that this does not apply to First Amendment activity.

MS. MEEROPOL: The problem is, your Honor, if we can just take congressional intent not to violate the First Amendment as a means to interpret every statute not to do that, then that is the end of overbreadth challenges. That

means Congress can include in every statute, "We don't intend to violate the First Amendment." And I'm sure Congress didn't intend to violate the First Amendment here.

THE COURT: And I am not asking for something that broad. I am talking very particular about this statute here and the Court's construing the statute here in light of the legislative history here and the very clear intent of Congress.

MS. MEEROPOL: Well, your Honor, I think that clear intent has to be balanced against the purpose of the overbreadth doctrine in itself, and that's to protect the First Amendment rights of not only criminal defendants, but individuals who are not in front of the Court whose speech will be chilled by an overly broad statute, regardless of whether Congress intended that speech to be chilled or not.

You know, this is a situation where this law is known about. This law has an impact in the animal rights community that is broader than just the parties before this Court. And whether or not Congress intended that impact, Congress has to be incentivized to pass laws that are narrow and proper on their terms, not simply saving them by indicating their intent not to violate the First Amendment.

THE COURT: Are you aware of any cases where the savings clause specifically references the First Amendment or some other constitutional provision or specific examples of

protected conduct like the one does here --

MS. MEEROPOL: Uh-huh.

THE COURT: -- where a court has gone on to say that the statute is nonetheless unconstitutional with a very specific savings clause like that?

I know you cited some cases in your brief, but none of the savings clauses in those particular cases had a specific reference to a specific constitutional provision or specific conduct like the one does here.

MS. MEEROPOL: Your Honor, I'm going to have to look back at the briefing. And I will do that after I sit down and try to bring you -- I do have a case in mind, but the name is escaping me at the moment.

But I do believe that one of the out-of-district cases that involved restrictions on a parade permit actually included -- and the name is just escaping me.

THE COURT: Okay. That is fine.

MS. MEEROPOL: But I will bring it to you.

THE COURT: That is fine.

MS. MEEROPOL: But the law is clear, your Honor -- and the government acknowledges -- that if the provision -- if the statute is facially invalid, if the statute as is fairly read infringes on First Amendment protected activity, then the savings clause cannot save the statute. And the Humanitarian Law Project, there was also a savings clause. And the Supreme

Court acknowledged that, but it went on to interpret the statutory provisions, not rely on that savings clause.

Unless the Court has other questions about the overbreadth claim, I'll turn to our vagueness claim next.

THE COURT: Go ahead and turn to the vagueness, please.

MS. MEEROPOL: Thank you.

So, of course, this is a claim that (a)(2)(A) of the Animal Enterprise Terrorism Act is unconstitutionally vague because it is so broad as to federalize almost any property crime against almost any business. And this invites, and, in fact, has resulted in, arbitrary and discriminatory enforcement.

THE COURT: And your argument here, just so the record is clear, does seem to be focused on the discriminatory enforcement prong of the vagueness doctrine, not the other one; is that fair?

MS. MEEROPOL: Not the notice --

THE COURT: Not the notice.

MS. MEEROPOL: -- prong.

Yes, that's correct, your Honor.

And just as an example, you know, if an individual is robbing a corner grocery store, right, and he's on a cell phone with his friend who is standing outside serving as a lookout, that is a violation of (a)(2)(A). This type of crime

occurs every day hundreds of times across the country. These crimes, of course, would be very unlikely to be prosecuted as Animal Enterprise Terrorism Act violations, and yet they fit the statutory description.

Given that, that's the situation, just like Papachristou, where the government has cast such a wide net that they can pick and choose with unfettered discretion which types of crimes to make federal crimes rather than allow them to be punished under state law, where one would normally expect that property crimes of that nature would be punished.

So, really, the government's argument here is that, you know, we haven't identified particular vague terms. But a term can be so broad as to fail to cabin police and prosecutorial discretion, just as it can be too vague to do so. The term "animal enterprise" here is so broad that it allows for this law to be used incredibly expansively; and, yet, of course, we see it used only against one group: A politically unpopular group, animal rights activists.

Moving on from the vagueness claim, your Honor --

THE COURT: Before you go on, why doesn't the other language in the statute that is more specific defeat your vagueness argument?

Let's assume "animal enterprise" is broad.

MS. MEEROPOL: Uh-huh.

THE COURT: Why doesn't the other language --

"intentionally damaging or causing the loss," the more specific language -- save the statute?

MS. MEEROPOL: Well, I think that's --

THE COURT: Because the cases you have relied on have very broad kind of archaic terms.

MS. MEEROPOL: They do, your Honor. That's fair.

THE COURT: Unlike this.

MS. MEEROPOL: You know, I think what's incredibly unusual about the Animal Enterprise Terrorism Act is that there is no actus reus. Right? The law punishes action taken for a particular purpose, and it's a very broad purpose: Interfering with an animal enterprise or damaging it -- that could be anything, really -- and, then, having a certain effect.

But the law does not include what the actual conduct at issue that is criminalized. That means that any conduct or speech can have the given effect and can be undertaken for the particular purpose.

So, actually, (a)(2)(A) doesn't really cabin the reach of the Animal Enterprise Terrorism Act at all. It broadens it. And it's really the interaction of those two provisions -- the lack of an actus reus, which is unusual in a criminal law, and the fact that "animal enterprise" is defined so incredibly broadly -- that gives rise to the unconstitutional vagueness here, your Honor.

THE COURT: Okay.

MS. MEEROPOL: Now, the Court had asked us to address, with respect to the substantive due process claim, the question of why -- whether it's rational for the government to call this Act animal enterprise terrorism. This requires a two-step analysis. First we have to hypothesize the possible reasons that Congress named the Act "Animal Enterprise Terrorism" and then determine whether those reasons are rationally related to a legitimate government purpose.

So, I can imagine two reasons here. The first and the most obvious is that Congress may have named the Act "Animal Enterprise Terrorism" if it describes conduct that can fairly be characterized as terrorism. But terrorism is about violence or a threat of violence or a risk of danger to human life. There's no one federal definition of terrorism, but there is a consensus among all of the federal definitions, and international law, as well, that terrorism includes as elements violence, threat of violence, as well as the motivation of coercing government cooperation or civilian cooperation.

None of those elements appear in (a)(2)(A). It's a provision that is quite clearly about causing loss of property. There -- and if we look at sort of the history of enforcement of that provision, it has primarily been enforced against individuals like these defendants who are accused of

releasing animals. There's no reason to expect that, you know, anything but a minute fraction of the covered crimes could properly be characterized as terrorism.

And I think People v. Knox, which is the New York sex offender mislabeling case, really exemplifies the way in which, you know, a fraction of charged criminal conduct might not fit a given label. And that doesn't make the label irrational necessarily, although some courts have found the other way. But you can imagine a situation in which there is a reason to call a broad class of crimes something that might not actually apply to some small percentage of those crimes.

In that case, it was about -- it was because of the particular vulnerability of the population and the fact that a sexual component and kidnapping, for example, is frequently hard to prove.

THE COURT: Isn't People vs. Knox that you are relying on for that, though, really distinguishable? Because what seemed to be driving the court there was the fact that sex offenders have to do something affirmative after the conviction -- they have to go out and register as sex offenders -- which is not the case here.

MS. MEEROPOL: That's right, your Honor. And, certainly, there is a stronger liberty interest in a situation in which one has to register as a sex offender. One does not have to register as a terrorist if one is convicted of animal

enterprise terrorism. But that doesn't mean that there isn't a liberty interest here, just as there was in People v. Knox, in avoiding having a misleading and stigmatic title apply to one's criminal conduct that simply doesn't fit. You know, the word "terrorism," it has implications here.

THE COURT: You argued in your brief that this label could potentially prejudice jurors, but the label is never going to be presented to the jurors. The government does not have to prove terrorism as an element, as you, yourself, have noted. The government has agreed they are not going to raise it. I would grant any type of motion in limine, if we get to that point, precluding them from raising it. I am not going to instruct them on it.

So, terrorism -- the label "terrorism" -- does not even get to the jury.

MS. MEEROPOL: Well, I think your Honor is obviously capable of ensuring that the jury is not prejudiced by the label within your courtroom. But that doesn't mean that the label won't have implications outside of your courtroom. Individuals who are convicted of animal enterprise terrorism will be known as convicted terrorists. There's not only --

THE COURT: By who?

MS. MEEROPOL: By the public and the press and the Bureau of Prisons, as well.

So, I would say the most concrete example of how this

can function to actually impact an individual relates to conditions of confinement, although that's not the only way in which the word has meaning.

But within the Bureau of Prisons, an individual convicted of a crime related to terrorism is eligible for placement in a communication management unit. These are incredibly restrictive units which limit individuals' opportunity to communicate with the outside world much more strictly than --

THE COURT: What -- I'm sorry. Go ahead and finish.

MS. MEEROPOL: -- than the general prison population.

THE COURT: What makes something related to terrorism for purposes of the BOP? Isn't it the Sentencing Guideline enhancement that defines terrorism, which is not an enhancement that is applicable here?

MS. MEEROPOL: No, your Honor.

So, the rules about CMU placement are actually the subject of litigation right now in the District of Columbia, which is my case, as well, which is why I know a bit about this.

THE COURT: It is very helpful.

MS. MEEROPOL: There's a pending procedural due process challenge. And part of that challenge is about sort of the fact that it's not really clear how the criteria applies. We do know that the counter-terrorism unit of the

Bureau of Prisons considers sort of individuals for placement in this unit based on a number of factors. And one of those factors is that the crime or the underlying criminal conduct relates to terrorism.

And that's understood pretty broadly. So, I think, you know --

THE COURT: Wouldn't that require an element of the crime, though, to relate to terrorism?

Again, we have a label here, which there is no evidence that BOP will even know that label is attached here because none of the elements relate to terrorism.

MS. MEEROPOL: Well, the government did acknowledge that one individual convicted of animal enterprise terrorism has served time in a CMU. And another convicted of animal enterprise terrorism, when the statute was called the Animal Enterprise Protection Act -- but even then the crime still carried the title "Animal Enterprise Terrorism"; I honestly don't know why, but that was how -- the language that was used -- also served time in a CMU.

So, that's two examples right there.

And what we know from the way that the CMU operates is that this word in there will come to the attention of the counter-terrorism unit and will at least prompt consideration.

Now, I'm not arguing that someone convicted of animal enterprise terrorism will automatically be placed in a CMU. I

don't think that's an accurate argument. But they will be considered in a way that other individuals won't. They are much more likely to end up in this unit than other individuals. And they are almost certain to have all of their communication monitored by the counter-terrorism unit of the Bureau of Prisons for the time that they are in custody.

That is a real-life implication.

THE COURT: Do you have any evidence of that?

MS. MEEROPOL: Well, we know that the counter -- it is publicly available information that the counter-terrorism unit's primary responsibility within the Bureau of Prisons -- I think this is something that the Court can take judicial notice of -- is to monitor terrorist prisoners inside the Bureau of Prisons. So, the word "terrorism," it's just -- it defies belief that an individual convicted of terrorism is going to escape attention by the counter-terrorism unit.

Moreover, your Honor, the precedent instructs us that one doesn't have to have a particularly significant liberty interest to still be deserving of rational basis review here. The Seventh Circuit has recognized liberty interests like the right to have a mustache or to groom one's hair the way one wants or the right of an undercover -- of an off-duty police officer to offer a motorcycle ride to a young woman. These are non-fundamental liberty interests.

And yet, even when the liberty interest is not

particularly fundamental -- and I would argue there's a strong liberty interest here because of the stigma attached to the word "terrorism." But even when there's a very minimal liberty interest --

THE COURT: But that is not necessarily what would define a liberty interest, is it?

MS. MEEROPOL: I'm not sure I understand the question.

THE COURT: I think you need to define what the interest is and the implications from the interest, rather than -- so there is a label attached, but what are the implications of that to define what the liberty interest is?

MS. MEEROPOL: That's right. The liberty interest is in not having a misleading label attached to one's crime. And the implication of that liberty interest in a case where the label is terrorism is, you know, not only the possibility of different treatment within the Bureau of Prisons, but also the stigmatic effect of being convicted of terrorism and having to potentially disclose that conviction to people in your community, to potential employers, having the press report on it as a terrorism conviction, as they have in past cases.

So, given that the Seventh Circuit has recognized the necessity of conducting rational basis review for even extremely minimal liberty interests, you know, the interests of not having a misleading label attached to one's crime

surely at least requires rational basis review.

Now, rational basis review is incredibly deferential, and that brings us back to where we started where I was addressing your Honor's question about what could the government's rationale be here. And I had gotten through one, but I do want to get back to the other one -- the other possibility, which the government raises in their briefs, which is that it's rational to call this animal enterprise terrorism because of some violence and violent rhetoric by some animal rights activists.

And this is really an argument that because there is a small fraction of criminal conduct that could properly be characterized as terrorism, it is rational to call all conduct -- all criminal conduct -- against animal enterprises terrorism, whether or not the conduct fits that description at all or not.

And given that (a)(2)(A) is so clearly addressed to causing the loss of property, there's simply no reason to think it's going to be anything but a tiny margin of cases.

THE COURT: But is it a tiny margin if you look at the legislative history? One of the representatives said that there had been some 1100 complaints involving violent incidents, involving more than 120 million in property losses. Can we characterize that as small?

MS. MEEROPOL: Well, there has never been a single

injury or death to a human being caused by an animal rights activist in this country, ever.

What the government really points to is rising property damage, which at times can occur in a way that is risky to human life. But that is in a -- and the government's own exhibits acknowledge, that that is in a -- very small minority of cases. And it's really -- I think the government's exhibits point more to a rise in violent rhetoric by some at the very fringe of this movement as an explanation for Congress's purpose here.

But one can imagine by analogy that Congress decides that, you know, okay, some murders occur in the course of a burglary, so we're going to call all burglary murder. It's probably a greater percentage than there is in this case.

But it's not rational because the label is so misleading. Because terrorism has a meaning that the community understands. And to call property crime terrorism because a tiny bit of the covered property crime could potentially be terrorism is so exaggerated and punitive as to simply not be reasonable.

THE COURT: I want to go back to your original argument about what the liberty interest is here.

MS. MEEROPOL: Uh-huh.

THE COURT: And you said it is the stigma --

MS. MEEROPOL: Yes.

THE COURT: -- of having a mislabel.

Have you found any cases that say that a stigma alone is enough to be a liberty interest?

MS. MEEROPOL: Well, this isn't a procedural due process context where a stigma-plus would be required.

THE COURT: Right.

MS. MEEROPOL: So, you know, I think People v. Knox is an example where the stigma -- well, I guess that's not fair actually because there was --

THE COURT: They did not find there was a rational basis?

MS. MEEROPOL: Yeah. There was more than just stigma there in terms of the reporting requirements.

But the proper comparison here is, you know, what's the stigma of having a misleading label attached to your crime compared to the other non-fundamental liberties that give rise to rational basis review.

And there, I think it's very important for the Court to reference the Seventh Circuit cases that we cited in our briefs that, you know, involve incredibly minimal liberty interests.

THE COURT: Okay.

MS. MEEROPOL: Unless the Court has any other questions, I will save some time for rebuttal.

THE COURT: I do not have any additional questions

for you.

Thank you.

MS. MEEROPOL: Thank you, your Honor.

THE COURT: Ms. Biesenthal.

If you would not mind, please, addressing the arguments in the same order.

MS. BIESENTHAL: Sure. Thank you, Judge.

So, starting with the defendants' argument concerning the overbreadth of the statute, I know your Honor is aware of this; but, as an initial matter, there is an almost insurmountable battle here for the defendants in having a statute invalidated based on overbreadth for First Amendment concerns. The government cited several of those cases in its brief, and I think it's not in dispute that there is a very high standard here that the defendants face.

THE COURT: I think the Supreme Court has said only as a last resort.

MS. BIESENTHAL: Only as a last resort. And, Judge, this case is certainly not a last resort.

What we have here is a statute in which Congress has very clearly criminalized conduct -- damaging or interfering with an animal enterprise.

Now, defendants have argued that the terms of the statute encompass what could be First Amendment protected activity. There's been a lot of discussion, in both the

briefs and then today, about the plain meaning of the words that are contained within the statute and rules of construction, as far as reading the statute. From the government's perspective, those arguments don't matter as much, but I do want to focus just on two things briefly.

The first is the defendants' statements repeatedly that the government has conceded that the plain meaning of "property" includes intangible property, which would include lost profits. The government has in no way conceded that the plain meaning of the word "property" must include intangible property.

The government does concede that that is one way to interpret the word "property," and that it has been interpreted that way in other statutes. But it's the government's position that it is also just as likely that the word "property" does not include intangibles and does not include lost profits.

And that is particularly true in the case like this where, if you look at the statute as a whole instead of just looking at that one particular word, it's very clear what Congress intended to criminalize. And they did not intend to criminalize lost profit as a result of peaceful demonstration or peaceful protest.

The second thing that I wanted to briefly touch on, as far as the rules of construction, is the defense's argument

that the term -- the word "use" -- property that is used by an animal enterprise, that that could include money.

Well, of course it could include money. Money is actually property. That is not an intangible that we're talking about. Money that an animal enterprise holds at a given moment is their property. If a cash register is filled with cash at an animal enterprise and that cash is stolen, it's property under any definition of "property," intangible or otherwise.

What we're focusing on -- and what the defense's argument is actually focusing on -- is this intangible lost profit, reputation. And what the defense didn't argue when they stood before your Honor is that an animal enterprise can in some way use their lost profit. Not the money that they have, but future lost profit or reputation.

Now, turning to the reasons why I think those arguments about the plain meaning of the word "property" and the rules of construction aren't necessarily as important in this case. And that's because Congress, looking at what it is that they were intending to criminalize, wanted to make it painfully clear what it was that was criminal under this statute; and, so, they did so.

They did it in two different ways. First, when they defined "economic damages" in the penalty provision, they expressly made exempt any financial damages that are the

result of a lawful boycott, lawful disruption of an animal enterprise. They made it as clear as they possibly could. The thing that the defense is worried is criminalized under this statute is expressly exempt.

If that couldn't be any more clear, they include an actual rule of construction that says peaceful protest and peaceful demonstration are expressly exempt from this statute. Two different places in the statute where they made it as clear as they possibly could. "Our intent -- " Congress's intent " -- is to make sure that animal rights activists are able to lawfully protest, to peacefully demonstrate, but that they are not permitted to use illegal action to damage an animal enterprise."

THE COURT: Ms. Biesenthal, the government did not rely on Blum vs. Holder, et al., in its submission. And the court specifically addressed the rules of the construction in there.

Especially given that there is no case law in this area other than that case and Buddenberg, why didn't you cite that or rely on it; and, what are you suggesting to the Court or what should the Court read from that?

MS. BIESENTHAL: The reason that the government didn't rely on it expressly in their submissions is because it was the government's position that that finding and the opinion was based primarily on a standing issue. Obviously,

the government --

THE COURT: And I do not disagree with that premise, but the Court did go on to talk about rules of construction and why there was not a real threat there to the individual Act.

MS. BIESENTHAL: The Court did go on to make those findings, and the government fully agrees with what the court stated in Blum vs. Holder. We just didn't rely on it because it was a standing issue. But we do agree exactly with what they've been saying that to -- what the court --

THE COURT: Okay.

MS. BIESENTHAL: -- relied on in that case for its reason in finding that there were sufficient safeguards to make sure that the government is not able to criminalize what would be First Amendment protected activity.

Judge, as far as, then, the limiting instruction, the instruction that says no First Amendment activity is criminalized under the statute, the defense, recognizing the problem with that -- that Congress did make it as clear as they possibly could that peaceful protest and peaceful demonstration are perfectly acceptable under the statute -- have tried to argue that that savings clause can't save an otherwise invalid or unlawful statute.

But the statute itself is not invalid. It's not unlawful. And looking at just the plain meaning of it, it's

incredibly clear what it is that's criminal. And what's criminal is unlawful, illegal damage to an animal enterprise.

In their reply brief, the defense noted that the government's reliance on the fact that the FACE Act -- which is the abortion clinic entrance act -- their savings clause has been upheld, which is exactly identical to the savings clause in the AETA, in the statute before your Honor.

They tried to differentiate that by stating that that statute is different because the FACE statute only criminalizes, I believe they said, force, threats of force or physical disruption. But in looking at the statute, that isn't actually true. The third prong of the FACE statute covers exactly what we have in this case, which is to say intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services. It's almost the exact same language.

That statute criminalizes the intentional damage of property to a reproductive health services clinic. It then has a savings clause exactly identical to the one in this case, which has been upheld.

So, in sum, as far as the overbreadth argument goes, your Honor, again, I cannot repeat it enough that the statute has two different places where Congress has made as clear as humanly possible to anyone reading the statute that this does

not criminalize First Amendment protected activity, and that it does not criminalize peaceful protest. It does not criminalize peaceful demonstration.

And one last comment on that point. I think the defendant said several times that this statute is confusing. And in reading the statute and just reading it for what it is and just looking at the words that are on the page, it's not confusing. I think the only way that it becomes confusing is when you try to make it confusing.

THE COURT: Can the Court look to the rules of construction -- which clearly say it does not cover First Amendment.

But can the Court look to the rules of construction in construing the statute in the first instance, or does the Court first have to decide in construing the statute, separate and apart from the rules of construction, whether or not it is constitutional?

MS. BIESENTHAL: I think the Court can look at them in conjunction. I think it can look at it as a whole.

The case law is clear that the savings clause will not save an otherwise completely invalid statute. So, I think the Court does need to look and say whether or not the statute would be completely invalid without the savings clause.

But looking at the two things together, it's clear Congress's intent. So, it informs the Court's decision in

looking at this plain language of the statute. It can't be completely separated because it expresses Congress's intent, which is what your Honor is tasked with doing in looking at and interpreting what the statute is meant to criminalize.

THE COURT: What role should the legislative history have for the Court in construing the statute up front?

MS. BIESENTHAL: I think the legislative history should definitely play a part in your Honor's decision in looking at what the statute is meant to criminalize. The legislative history is important so that your Honor has an understanding as to what it is Congress wanted to do.

The legislative history in this case makes clear that what Congress was concerned about is an unlawful underground campaign against people who are lawfully working in this country. And that concern is then ameliorated by the language that's placed within the statute itself that makes it unlawful to damage intentionally -- using interstate commerce for the purpose of damaging intentionally one of those animal enterprises.

The important thing about the legislative history, though, is that it makes clear that Congress did not intend to criminalize peaceful protest or peaceful demonstration.

So, when your Honor is looking at the statute, your Honor absolutely should take into consideration everything your Honor knows about Congress's intent. The beauty of the

way that this statute is written, though, is that your Honor doesn't -- isn't left wondering. No one's left wondering as to what their intent was because of those two express provisions within the statute that expressly exempted any kind of First Amendment protected activity.

And if your Honor has no other questions on overbreadth --

THE COURT: I do not. You may turn to void for vagueness.

MS. BIESENTHAL: So, next moving to void for vagueness -- and I know your Honor had some questions about this.

THE COURT: I did because your -- there are two ways that a statute can be voided for vagueness. One is the notice requirement, and one is the enforcement -- the discriminatory enforcement.

Your response brief seemed to focus on the notice and not the discriminatory enforcement. So, that's what I would like you to address today.

MS. BIESENTHAL: And it did. And if I could give your Honor some just background on why it did.

I think the government's understanding of the defense argument in their opening brief is different than the government's understanding of their argument now.

The government's understanding from the opening brief

was that the defense was making a broader attack on the statute; that the defense was arguing that the statute was so vague that it implicated First Amendment concerns, sort of melding their vagueness argument with their overbreadth argument, which is why the government responded the way that it did and why the government did not challenge the defendants' standing to make the argument that they're making.

As I understand it today, based on their reply brief and their arguments to your Honor, their vagueness argument is now a very limited argument and they're only asserting that the definition of "animal enterprise" is overly broad.

In that case --

THE COURT: And leads to discriminatory enforcement.

MS. BIESENTHAL: And leads to discriminatory enforcement.

In that case, there's no First Amendment implication whatsoever to the defendants' argument. The fact that the "animal enterprise" definition may be overly broad and lead to discriminatory enforcement does not implicate the First Amendment. And, so, the defense actually has no standing to attack the statute facially for vagueness.

It's Black Letter Law, and I have cases for your Honor if your Honor wants to see them, that in order to attack facially a statute for void for vagueness, the argument must implicate First Amendment concerns. If it does not, the

defense is left with only an as-applied attack to the statute.

Here -- so, assuming that the defense argument is this limited piece, that it's only the definition of "animal enterprise" that's problematic from a vagueness standpoint, they are limited to an as-applied attack.

And here, there is absolutely no way that this statute is vague as applied to defendant Johnson and defendant Lang's conduct. Your Honor is familiar with the facts of the case --

THE COURT: And I think they said it is only a facial challenge that they are pursuing. On rebuttal, she can confirm that. But they are not arguing as applied on this -- on void for vagueness.

MS. BIESENTHAL: It's the government's position that they're only permitted to argue as applied, though.

THE COURT: I understand.

MS. BIESENTHAL: So --

THE COURT: But I do not think they are arguing that.

But go ahead. Go ahead.

MS. BIESENTHAL: I just want to make sure I'm not waiving any argument for the record, Judge. That it's our position that at this point, if they're only arguing animal enterprise, they are not arguing First Amendment has been implicated; and, they are left with only an as-applied attack, which they lose because the statute is incredibly clear that

animal enterprise includes both a breeder and a furrier, which is exactly what the defendants have been charged with.

Now, giving the defense the benefit of the doubt and assuming that they are arguing that First Amendment concerns are implicated and they do have standing to facially attack the statute as being vague, they still lose. And the reason is, is because the statute is clear and gives no discretion to law enforcement as to what is actually criminal.

The government concedes that the definition of "animal enterprise" is broad and it includes a lot of different things. But it does not give law enforcement the discretion to decide what is or is not criminal under the statute. That part of the statute is clear.

Yes, it criminalizes potentially a lot of different conduct that ordinarily, historically would be something that's left to the state to punish. But that doesn't invalidate the statute, and it doesn't give law enforcement the type of discretion as contemplated by these other cases that the defense has cited where the statute is actually void for vagueness because of the ability of law enforcement to use too much discretion.

In those cases, what's clear is that law enforcement is given too much discretion to decide what is criminal. So, the examples that the defendant has cited: What is vagrant? What kind of conduct ends up being vagrant? What kind of

conduct is annoying? What kind of conduct is oppressive? We don't have those kinds of words in this statute that gives law enforcement any type of discretion to determine what is violated by the statute.

To use the defense's example from their reply brief, if someone throws a rock through a window at a Whole Foods, they're guilty of a crime. If they used interstate commerce for the purpose of throwing the rock through the window at the Whole Foods, they could be guilty under this particular statute. The government's not arguing that they couldn't.

But there's no discretion there. Law enforcement sees someone throw a rock through the window at the Whole Foods, there's no discretion to determine whether that's a crime. It is. It's clear it's a crime.

The issue becomes that there is some discretion, then, as to whether the federal government ends up charging the case or it's a state case. But that's a different issue. That's not the vagueness doctrine, and it's not the examples that have been cited by the defense where there's this question left to law enforcement that it's up to them to decide whether a crime has actually occurred.

Here, no discretion; crime has occurred. The question then is whether the federal government's going to take it or the state's going to take it, which is something that doesn't invalidate a statute. And it's clear that that

kind of discretion does not invalidate a statute, just in looking at the drug crimes or, another example, with mail and wire fraud.

Mail and wire fraud statutes criminalize what could be breach of contract cases and state cases all the time. There have been vagueness challenges to the mail and wire fraud statutes for the exact reasons that the defense is positing. One of them is in United States vs. Hausmann, which I'll provide to your Honor.

In that case, the defendants argued that the mail and wire fraud statutes were unconstitutionally vague for this exact reason -- that they criminalized what could be breach of contract cases or state cases. And in that case, the Seventh Circuit was very clear that Congress has the authority to regulate the use of interstate mailings and interstate wires to criminalize conduct.

THE COURT: Do you want to put the cite for that on the record, if you have it?

MS. BIESENTHAL: 345 F.3d 952.

And the court in that case stated, "Without some showing that either the statute in question or the prosecution of this case contravenes some specific rule of constitutional statutory law, the mere fact that the conduct in question is of a sort traditionally dealt with through state law cannot serve as a basis for dismissing the indictment.

So, in sum, Judge, what we have here is a case where, again, it's our position that the defense does not have standing to facially attack this statute. They only have an as-applied challenge, which they lose. But assuming that they are able to facially attack this statute, what we have here is not a vague statute that allows law enforcement discretion to decide whether something is a crime. Instead, we have a clear statute that does criminalize a broad range of conduct, but then it's left to the discretion of the prosecution to decide whether it's charged federally or state, which is a completely separate issue than vagueness.

THE COURT: Ms. Biesenthal, do you want to put on the record the case names and cites for your first proposition, that they do not have standing to facially attack the statute if it does not raise a First Amendment concern?

MS. BIESENTHAL: I will. That's U.S. vs. Stephenson, 557 F.3d 449, and Chapman vs. United States, 500 U.S. 453.

And, Judge, I wanted to just respond, before I move on to the due process argument -- unless your Honor --

THE COURT: No.

MS. BIESENTHAL: -- has more questions about vagueness, I did want to respond to something that the defense said as far as the vagueness goes and as far as the discriminatory enforcement of the statute.

The defense stated that the government is using this

statute against the unpopular group of animal rights activists. And as I stated in my overbreadth argument, I will state, again: That's not how the government is using this. It's not meant to criminalize the lawful activity of animal rights groups activists. What it is meant to do is criminalize the illegal damage to animal enterprises. It's intended to criminalize crime, not lawful protest and not lawful activism.

Now, as far as the terrorism argument, the due process argument -- and, again, here I know I don't need to keep saying it, but this is an almost insurmountable battle, as well, for the defense in having a statute overturned for violating substantive due process, especially for something like this.

Here, it's the government's primary argument that there is no liberty interest at stake whatsoever because the defendants are not labeled as anything. Defense, during her argument, repeatedly stated that Congress named the statute "Animal Enterprise Terrorism." Congress didn't name the statute anything. This statute is referred to as the Animal Enterprise Terrorism Act. It's not codified as a terrorism Act. It's not one of the Acts that is under terrorism statutes. It doesn't even have a terrorism sentencing enhancement applied to it.

So, the defense -- the defendants, in being charged

under a statute, are not labeled as anything. They have no title at all.

Now, moving on to the defendants' arguments, then, about the possible liberty interests that would be at stake if your Honor does find that the defendants are in some way labeled as something, the defense has argued primarily that the issues at stake for them are the social stigma, the issue of juror pool outside of the courtroom, the issue of possible disclosure of this offense as a terrorist act to the public and the press and the Bureau of Prisons.

I'll start with the first chunk of arguments first because I think that those are easily disposed of, because the government has not ever referred to either defendant as a terrorist and never will. There is no social stigma attached to what the defendants have been charged with from the government's perspective. And it's -- frankly, the defense loses credibility in arguing that there's a social stigma issue and that there's a problem with the press labelling the defendants as terrorists or their friends or the potential jury pool when they are the only ones who have ever called the defendants terrorists.

They are the only ones who have spoken to the press about what the defendants have been labeled as purportedly. They are the only ones who have issued press releases on their own Web sites about what the defendants have been labeled as.

THE COURT: Was there a press release from law enforcement? I thought there was some suggestion that there was a press release when this case was originally indicted referring to --

MS. BIESENTHAL: I don't believe -- I'm sorry, Judge.

THE COURT: -- referring to the Act as the Animal Enterprise Terrorism Act.

MS. BIESENTHAL: I don't believe that the press release had to do with this case. I might be wrong.

THE COURT: Okay.

MS. BIESENTHAL: I'm sure I'll be corrected if I'm wrong.

I don't believe that the press release was for this case. I believe it was for another case.

When your Honor mentioned that you would grant a motion to exclude any reference to the term "terrorism" that was presented by the defense, the government will be moving in limine to prevent any reference to the word "terrorism" at trial. And, so, I think we are all in agreement that no one is calling the defendants terrorists.

The reason no one is calling the defendants terrorists is because, from the government's perspective, it's completely irrelevant. We have no need to establish that the defendants are terrorists in order to establish our case. And we have never told the press that they are terrorists, and we

do not plan on doing so.

So, there's no social stigma, from the government's perspective or from anything that the government has done.

As far as the Bureau of Prisons, the defense is correct, that because this statute is known as "Animal Enterprise Terrorist Act," for a BOP designation, the case will be seen by a counter-terrorism unit employee in determining designation. But that's all it is. There's no practical effect to the fact that that case is being referred to a counter-terrorism unit employee other than that employee looks at the facts of the cases, like they do with every single case that comes before them, in order to determine whether and where someone should be designated.

So, the fact that, say, one of the defendants in this case is ultimately convicted and that is then sent to the counter-terrorism unit, they will look at the background of the defendant; they will look at the facts of the case; and, they will look at the behavior of the defendant for the time -- in Mr. Johnson's respect, at least, that he's had time incarcerated prior to, assuming there's a conviction -- look at that time and determine, those things as a whole, what unit that particular prisoner should be placed in.

THE COURT: And is that triggered solely by what the statute is referred to as?

MS. BIESENTHAL: In this case, it is. That's my

understanding, that it is. That if there is a conviction under this statute, it will be referred to the counter-terrorism unit.

THE COURT: You submitted, in your response brief, some statements of individuals from BOP and summarized those. Can the Court rely on that at this stage without hearing evidence on it?

MS. BIESENTHAL: I think that the government can rely on -- or the Court can rely on a government proffer and take that for the weight that the Court wants to give it.

In our brief, we did say that we would be more than happy to make that individual available. That offer still stands if the Court is inclined to grant the defense motion on this issue. We absolutely will bring him before your Honor. And we can do that as quickly as possible.

Your Honor, the last thing is as far as whether this is rationally related to -- whether Congress has a rational interest in actually criminalizing this as terrorism. So, now we're assuming that the defendants are labeled as something, and then we're assuming that there is some kind of liberty interest attached to that label.

Up until this point, the government has not set forth a significant amount of information about why it is that it's the government's belief that the Congress did have a rational interest in actually criminalizing this conduct as terrorism.

The reason that the government has not proffered a significant amount of information on that point is because up until now, the defense has objected specifically to an amicus brief being filed that argued that position. And they argued it would be prejudicial to the defendants moving forward in the case for the government, or anyone else for that matter, to proffer a lot of information about the animal rights extremist campaign and some of the reasons that this was brought to Congress as a "terrorist act," if your Honor believes that that's what it's been labeled.

If your Honor is inclined to grant the defendants' motion in that respect, the government certainly is ready now to argue why it is rationally related -- or why Congress has a rational interest, rather, in criminalizing this as terror.

THE COURT: I am not giving an inclination one way or the other, but for the record, why don't you make your "rationally related" argument.

MS. BIESENTHAL: Judge, first of all, the defense has argued repeatedly that in order for something to be considered terrorism, it has to be a violent act. In support of their argument that an act of terrorism has to be a violent act, they have cited definitions of international terrorism. These acts, obviously, are not acts of international terrorism. Instead, they have been designated by the FBI as acts of domestic terrorism.

The definition of "domestic terrorism," which is under title 18 U.S.C., Section 2331, states, "Involving acts dangerous to human life that violate federal or state law and appear intended to intimidate or coerce a civilian population," which is a very different definition than one that involves only violent acts. Acts that are dangerous to human life involve a significant amount more than truly violent at their core acts.

In any event, there are acts that are codified under the terrorism statutes that don't involve actual violent acts. Those include crimes relating to computer attacks and government contracts, which is 18 U.S.C., Section 2332b(g)(5)(B).

Now, in any event, even setting aside the definitions and the government's dispute with the defense definition of what terrorism is and what something needs to be in order to be terrorism, the defense is arguing to your Honor, and in their briefs has argued to your Honor, the conduct of the defendants in a vacuum.

What they've argued is only this one release of mink, and that the three times that this case -- that this statute has been charged, that it's involved release of animals and that those are not violent acts.

First of all, just looking at those acts themselves -- trespassing onto an individual's property in the

middle of the night, committing damage upon their property, and releasing all of the animals that they have purchased and that they are breeding -- involves an act that's dangerous to human life.

Trespassing in the middle of the night in order to instill fear and to attempt to get a lawful, law-abiding citizen to stop doing what they're doing not lawfully, not through lawful protests, but through instilling fear and strong-arming is terror.

Setting that aside, the animal rights extremist campaign -- and I want to be very clear that I am not talking about animal rights activists. I am not talking about lawful protests. I am talking about the underground campaign that was referred to by the FBI in asking Congress to enact this statute. That campaign involves a lot more than just releasing mink. And the defense has said that that didn't involve any acts that have ever actually physically harmed a particular individual.

I ask your Honor in deciding this case, in deciding this issue, to look at the government's submission in moving to detain Kevin Johnson. Setting aside all the information that the government has about things that have been done by the animal rights extremist movement leading up to the enactment of this particular statute, just look at what the government has proffered has been done by Kevin Johnson in

support of his unlawful campaign.

There has been stalking. There has been property damage. There has been storming a bank where people are working. There has been hanging out outside of people's homes screaming they're going to burn their homes down and telling them that they know who their children are. Those acts are rationally related to an interest in criminalizing that campaign as one of terror.

Now, the government also has cited to your Honor the examples that were made by the FBI Director to Congress, which includes arson, which includes the use of explosive devices, which includes stalking, which includes the collection of personal information about law-abiding citizens and their children. The government and Congress had a rational interest in defining these particular crimes as terror.

So, even if your Honor finds that the defendants have been labeled as something -- which they haven't -- and even if your Honor finds that there's a liberty interest at stake based on that label -- which there isn't -- there was a rational interest in actually criminalizing that conduct as terror.

And if your Honor has no further questions --

THE COURT: I do not believe I do. Just give me one second, please.

(Brief pause.)

THE COURT: I do not. Thank you.

MS. BIESENTHAL: Thank you, Judge.

THE COURT: Rebuttal?

MS. MEEROPOL: Thank you, your Honor.

A few points to go over. First, the government has argued that (a)(2)(A) should be interpreted not to apply to lost profits that result from First Amendment protected activity. It's a combination of both aspects in terms of their interpretation of (a)(2)(A).

So, it's still not clear to me whether the government interprets (a)(2)(A) to limit liability based on causing loss to intangible property or only limit liability arising from First Amendment protected activity that causes loss to intangible property.

And that's a major problem in the interpretation of the statute, because individuals not before the Court must have notice of what is illegal under the operative provision of the statute.

Now, the government argued that money is tangible property, and that we are concerned only with loss of profits or business reputation. But that's not entirely the case, your Honor. Because increased security costs are also aspects that could frequently arise from First Amendment protected activity. There's a protest outside an animal enterprise and the enterprise hires an extra security guard, that causes the

loss of in-the-pocket, currently-owned money which arises from First Amendment protected activity.

And relevant to that point, in a prior prosecution under the Animal Enterprise Protection Act, which includes similar language about causing the loss of property, the government included as such loss -- and we cited this in a footnote of our opening brief -- causing employees to waste their time; causing a business to purchase new computer software, to -- additional firewalls and the like.

So, there is a history of interpreting this provision to apply to intangible losses.

Now, in that case, the court found that the speech that gave rise to those intangible losses wasn't protected speech. But it was still speech that caused the loss of intangible property. And that's the history of the enforcement of the statute.

The government argued, with respect to economic damage, that economic damage -- that certain types of economic damage -- have specifically been excluded from giving rise to AETA liability. And that is not the case, your Honor. What is excluded are certain economic damages cannot give rise to an increased penalty under the Animal Enterprise Terrorism Act. But that says nothing as to whether those types of economic damages can give rise to a substantive violation of the statute.

And there I do want to emphasize one statement from the court -- the government's opening -- the government's opposition brief.

On Page 9, they cited United States v. Buddenberg for the proposition that economic damage standing alone cannot give rise to an AETA violation, and the court did not hold that in Buddenberg. The court held that economic damage standing alone cannot give rise to a violation under a (a)(2)(B) of the statute because (a)(2)(B) requires a threat. The Buddenberg court did not consider whether (a)(2)(A) liability exists for causing economic damage.

In Blum -- your Honor asked the government about Blum. And I think it's important there to emphasize that the First Circuit did not interpret (a)(2)(A)'s reach. They explicitly considered the district court's finding that the parenthetical limited the broad term "any personal property." They considered the government's argument in that case that used -- limited the proper interpretation of "any personal property."

And they decided they didn't have to decide what (a)(2)(A) covers because of the savings clause. And that's simply not the proper approach in a merits overbreadth analysis where it is a hundred percent clear that the proper first step is to interpret the reach of the statute.

The government also directed the Court's attention to

the FACE statute. And I would direct the Court to the "Definitions" section of the FACE statute. I, unfortunately, don't have it in front of me, but my recollection is that the definitions limit the way in which that statute could be used in a way that is substantially more protective, and that the definitions are what limit the statute's application to protected speech and advocacy, unlike a savings clause in this case.

Moving on to the vagueness argument, your Honor, it is correct that we do not make an as-applied vagueness challenge here. But criminal defendants are allowed to make vagueness facial challenges whether or not the statute implicates First Amendment rights. The requirement is simply that in that situation, the statute is also vague as applied to them.

So, there's not a technical requirement that a criminal defendant can only make an as-applied vagueness challenge. It's rather that when the Court is considering that vagueness challenge -- the facial vagueness challenge -- the Court must also consider how the statute functions with that defendant as an example.

Because vagueness -- facial challenges in the First Amendment context provide for relaxation of standing rules. Right? The First Amendment interest is the reason that an individual innovating this challenge can challenge a statute

even if it's not infringing on his or her own First Amendment rights. Without that standing relaxation, a defendant can only bring a facial challenge if the statute is actually vague as applied to them, as well; and, this statute is.

And that's because we're not arguing about notice to the individual defendant. We're arguing about inviting discriminatory and arbitrary enforcement. And this is exactly an example of the type of arbitrary and discriminatory enforcement allowed under the statute.

THE COURT: And you are saying that it is your position that you can still challenge a statute as void for vagueness in a facial challenge, whether or not First Amendment implications arise?

MS. MEEROPOL: That's right, your Honor. And Papachristou is an example of that. That wasn't a First Amendment challenge at all.

And the cases that the government cites to, I've only been able to read them quickly, but they don't stand for the proposition that a facial challenge is not proper. They stand for the proposition that the statute must also be measured with respect to the defendants' conduct and the Court must use the example before it when considering the challenge.

Turning to the substantive due process claim --

THE COURT: Before you turn, do you agree then that your facial challenge on the void for vagueness does not

implicate First Amendment concerns?

MS. MEEROPOL: No, your Honor. If the Court agrees with our interpretation of the statute with the overbreadth argument, then we are in a situation where the statute does implicate First Amendment rights and --

THE COURT: But that is for the overbreadth. You made a different argument for the void for vagueness. So, I think you are mixing the two arguments. Your void for vagueness was focused more on the animal enterprise aspect of it rather than it implicating legitimate First Amendment concerns, as is your overbroad basis.

MS. MEEROPOL: Well, it's both, your Honor. You know, it is the breadth of the term "animal enterprise" that is important here, but that's not the only part of it. I believe I said this earlier, that it's also the lack of an actus reus that makes this statute so broad. And that is completely connected to the First Amendment overbreadth argument that because the criminal conduct isn't specified, it need not necessarily be conduct; it could just as easily be speech.

And for that reason, if the Court agrees with the overbreadth claim, then we are in a situation where there's a relaxed standing.

But I actually think at the end of the day, it doesn't make that much of a difference because our vagueness

argument is the same in either regard. It's that the statute invites arbitrary and discriminatory enforcement. And if that's the case, then there's no reason why that also wouldn't follow with respect to this individual prosecution.

This is a statute where, you know, it's not about choosing whether there's going to be a federal or state prosecution necessarily. There already was a state prosecution in this case.

The government talks about, you know, the difference in vagueness terms about whether a statute -- it's vague whether the conduct is actually criminalized versus a charging decision. But, of course, the vagueness here comes from whether the conduct is a federal criminal violation on top of being a state criminal violation.

Turning now to --

THE COURT: So, is that what you are arguing, that it makes it void for vagueness because it criminalizes state crimes -- it federalizes state crimes? Is that what your argument is?

MS. MEEROPOL: Well, because it federalizes such a broad swath of state crimes. You could imagine a statute that is much more narrowly targeted at animal enterprise extremism. The government -- and this moves a little bit into the substantive due process claim, but the government talked about some specific examples. And we're not arguing that Congress

wouldn't have a legitimate interest in crafting a statute that addresses that type of extreme behavior. This simply is not that statute. This is an incredibly broad statute.

THE COURT: Do you have any cases to support your argument that a statute can be void for vagueness because it over-federalizes crimes, which is what I am hearing you say?

MS. MEEROPOL: No, your Honor, I haven't been able to find a particular -- a specific case on point. The ACCA, the Armed Career Criminal -- I can't remember what the last "A" stands for, but it's currently up before the Supreme Court.

THE COURT: Act.

MS. MEEROPOL: Yes. That makes sense.

We cited it in our briefing. And it's possible this is actually going to be an issue that the Supreme Court takes up. We'll have to wait and see what happens with that. But --

THE COURT: And I am not sure if that is the -- maybe you are involved in this one, too, but I am not sure if that is the -- precise issue that is framed before the Supreme Court.

MS. MEEROPOL: No.

THE COURT: I think it is a little bit different.

MS. MEEROPOL: I think that's right, your Honor. But what makes that analysis relevant is that -- and I'm not involved in this case; so, I have no personal understanding,

except what I've read in Supreme Court papers -- but that the definition of what a qualifying offense could be because of the examples that are given are so broad that it could basically apply to almost any federal offense, and that that creates a vagueness problem.

So, what I think is somewhat analogous there, although we don't really know if it's analogous until the Supreme Court issues their decision, is just breadth creating vagueness, which is a lesser-developed arm of the vagueness doctrine.

But in reading Papachristou carefully, you know, while I will certainly acknowledge that that statute includes incredibly archaic and vague terms, that really wasn't the heart of the Supreme Court's analysis there. It was about the fact that it casts such a wide net and, thus, allows so much discretion.

Now, moving on to some of the substantive due process points, first of all, in terms of the stigma of being labeled a terrorist, the government in the past, in past Animal Enterprise Terrorism Act prosecutions, has issued press releases; has commented on Joint Terrorism Task Force involvement; has referred to the individuals in press releases as terrorizing the public.

So, while they have disavowed the intent to do so in this case, it doesn't mean that that doesn't happen. And we

provided examples of the way the press is likely to report this, as well. Not simply in situations where defendants themselves issue, or defendants' organizations issue, press releases, but where the press independently reports on the nature of the conviction.

The government is correct that the statute is not titled, "Animal Enterprise Terrorism." Rather the Act is codified as being referred to as animal enterprise terrorism. And the preamble of the Act refers to it providing the Department of Justice with the means necessary to fight animal enterprise terrorism. So, while the title of the statute doesn't exactly include the terms, it is not the case that those terms don't exist with respect to the actual language of the statute.

The government acknowledged that an individual convicted under animal enterprise -- of animal enterprise terrorism will be considered by the counter-terrorism unit of the Bureau of Prisons just as would anyone else who comes across their desk. And that's really the operative term there. Because not everyone in the Bureau of Prisons comes across the desk of the counter-terrorism unit.

And to the extent that there is any question that the stigma of just the word "terrorism" would give rise to a non-fundamental liberty interest, I think that admission answers that question. This is a real impact -- that this

individual will be considered by a counter-terrorism unit specialist within the Bureau of Prisons.

The government argued that we have claimed that terrorism is just an act of violence. And that is not the case, your Honor. We were explicit in our brief that the consensus about what terrorism is or isn't is an act of violence or a threat of violence or an act that is dangerous to human life. We acknowledge that that "dangerous to human life" is a different component; that it's in many terrorism definitions; and, it's simply that property crime -- causing the loss of property -- does not require an act that is dangerous to human life.

The government says that throwing a rock through the window of Whole Foods is an act of terrorism, that trespass is an act of terrorism because all of that is dangerous to human life. And that makes the word "terrorism" completely meaningless.

And, then, I would refer the Court to the People v. Morales case, which, you know, isn't on point for any sort of particular legal issues -- we cited it at the very end of our opening brief -- but does discuss the importance of not misusing a word like "terrorism," that has a particular meaning, to apply to a broad swath of activity where the label simply doesn't follow.

Unless your Honor has any other questions?

THE COURT: You were going to look for -- and I know you only had a short amount of time and you were listening, as well, but you were going to look and see if you had any cases to support savings clauses that were similar to the one used here.

Were you able to do that? If not, I will give you time and you can --

MS. MEEROPOL: Yeah. No, your Honor. I would be happy to submit additional briefing on that issue if the Court would find it helpful. But I think Humanitarian Law Project is a good case to exemplify the way a similar First Amendment savings clause is used by the courts.

The Supreme Court didn't explicitly hold one way or the other exactly how the savings clause should operate there. But if you look at the court's analysis, it is crystal clear that they first analyzed the substantive provisions and that that is what must be done.

And that's all we're asking this Court to do -- to first analyze the substantive provision.

THE COURT: Okay.

Let me just make sure. I do not think I have any additional questions.

I do not. Thank you.

MS. MEEROPOL: Thank you, your Honor.

THE COURT: I do not want further briefing from

anybody unless I ask for it. So, please, either side, do not submit any additional briefing.

Thank you.

MS. MEEROPOL: Thank you, your Honor.

THE COURT: So, I am going to take this under advisement and will certainly issue a written opinion on it.

Why don't you come back here -- does March 24th at 9:00 a.m. work for you?

MS. BIESENTHAL: That's fine.

THE COURT: Is that okay for the defense? Mr. Meyer, Mr. Deutsch?

MR. MEYER: It is, Judge.

THE COURT: Mr. Deutsch, does that work? March 24th.

MR. DEUTSCH: Yes, that's fine.

THE COURT: Okay.

March 24th at 9:00 a.m., we will have another status in the case. And it is my intention to rule on the motion to dismiss before then.

Is there any objection to excluding time in the interest of justice, given the pending pretrial motions?

MR. DEUTSCH: No objection for Mr. Johnson.

MR. MEYER: No objection for Mr. Lang, Judge.

THE COURT: Is there anything else for the Court this morning?

MS. BIESENTHAL: Nothing from the government, Judge.

THE COURT: Thank you.

MR. MEYER: Thank you.

THE COURT: I will see you in March.

* * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joseph Rickhoff December 16, 2015
Official Court Reporter